IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3835 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KAMAL CINEMA THROUGH ITS PROPRIETOR
Versus
COLLECTOR

Appearance:
MR SANJAY D SUTHAR for Petitioner No. 1
MR KT DAVE, AGP for Respondents No. 1-2

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE M.C.PATEL

Date of decision: 02/02/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

The petitioner Kamal Cinema has filed this petition under Article 226 of the Constitution through its proprietor Shri Hasmukh Babulal Dalal and prayed that by issuing writ of mandamus or any other writ or order, the action of the respondents - authorities of applying seal on the petitioner Kamal Cinema may be declared illegal and that he may be permitted to make payment of outstanding entertainment tax by way of monthly instalments.

2. Initially, when this matter was placed before the Division Bench consisting of M.S. Shah and A.M. Kapadia, JJ. on 31st March, 2004, notice was ordered to be issued on this petition making it returnable on 5th April, 2004 without passing any interim order on it. On 5th April, 2004, by granting leave to amend, the matter was adjourned to 12th April, 2004 as copy of the petition was not served upon the other side by the petitioner. On 15th April, 2004, the parties were given liberty to place on record the Valuation Report in respect of the cinema hall in question and with a view to enable the petitioner to get such valuation made, the respondents were directed to permit the petitioner and its valuer to inspect the property. Accordingly, the matter was kept on 21st April, 2004.

3. On 21st April, 2004, the said Division Bench admitted the petition by issuing rule on it and passed a reasoned order while granting interim relief. We would like to reproduce it, which is as under:-

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

Date of Order: 21/04/2004

ORAL ORDER
(Per : HON'BLE MR.JUSTICE M.S.SHAH)

Rule.

Heard Mr. S.D. Suthar, learned counsel for the petitioner and Mr. Siraj Gori, learned A.G.P. for the respondents on the question of interim relief, after taking the valuation reports on record.

2. Having heard the learned counsel for the

parties on the question of interim relief, we are of the view that although the arrears of entertainment tax are substantial, we do find some substance in the submission of Mr. S.D. Suthar, learned counsel for the petitioner, that even if the cinema hall is required to be sold, if it is sold as a running theatre it will fetch much higher price than at the distress sale of such property in sealed condition.

3. Hence, subject to the conditions that the petitioner pays initially a sum of Rs.6 lakhs and files an undertaking before this Court to pay every month a sum of Rs.3 lakhs towards arrears of entertainment tax and also to pay current entertainment tax and further that the petitioner shall not transfer, dispose of or part with possession of the cinema hall and the land, building and the machinery or any part thereof or create any encumbrance thereon without prior permission of the respondents, the respondents shall remove the seals and permit the petitioner to run the cinema hall after the petitioner pays the first instalment of Rs.6 lakhs and files the undertaking incorporating the above conditions.

4. It is clarified that this interim relief is granted in favour of the petitioner in order to enable the petitioner to run the cinema hall so that the petitioner can get buyer/s with reasonable offer rather than permitting the cinema hall to be sold at a distress sale.

As and when the petitioner finds out such prospective buyer/s the petitioner will file a Civil Application before this Court for appropriate orders and this is expected to be done by December 2004.

Direct service is permitted.

4. As per the aforesaid order, on paying the first instalment of Rs.6 lakhs, seal was removed. Thereafter, Civil Application No.5287 of 2004 came to be filed in this petition against the coercive recovery of the arrears of entertainment tax with interest and penalty in respect of Kamal Cinema belonging to the petitioner, which was disposed of by a detailed reasoned order dated 5th August, 2004, which we would like to reproduce as under:-

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

Date of Order: 05/08/2004

COMMON ORAL ORDER
(Per : HON'BLE MR.JUSTICE M.S.SHAH)

The petitioner challenges coercive recovery of the arrears of entertainment tax with interest and penalty in respect of Kamal Cinema belonging to the petitioner. The property in question is building with land in Sub-plot Nos.13 and 15 of Final Plot No.629 + 631 in Town Planning Scheme No.23, Moje Achar at Ramnagar, Sabarmati, Ahmedabad of land bearing Survey No.187 and admeasuring 1146 sq.mts/1380 sq.yds.. The built-up area of the property is approximately 600 sq.yds. and front seven stalls (small shops).

2. When the petition came up for admission hearing, the learned counsel for the petitioner had submitted that the respondent-authorities were proceeding to put up the entire cinema hall and the land to auction after applying seal thereon and if the cinema hall and land were to be sold in such a condition, the property would fetch much lesser price. On the other hand, if the cinema hall is sold as a running theatre, it would fetch much higher price. The Court accepted the said submission and required the petitioner to pay initially a sum of Rs.6 lakhs and also to file an undertaking that the petitioner shall continue to pay Rs.3 lakhs towards arrears of entertainment tax and also to pay current entertainment tax with a further undertaking that the petitioner shall not transfer, dispose of or part with possession of the cinema hall and the land, building and the machinery or any part thereof or create any encumbrance thereon without prior permission of the respondents. Upon fulfillment of the above conditions, the respondents have removed the seals and permitted the petitioner to run the cinema hall. In the said order dated 21.4.2004, it was stated that the interim relief to the aforesaid effect was granted to the petitioner in order to enable the petitioner to run the cinema hall so that the petitioner can get buyer/s with

reasonable offer rather than permitting the cinema hall to be sold at a distress sale. Liberty was granted to the petitioner to move this Court as and when the petitioner found out such buyer/s.

3. Civil Application No.5287 of 2004 has been filed by the petitioner with a plea that since the petitioner is not in a position to find out a buyer of the cinema hall with the land, the petitioner may be permitted to demolish the cinema hall and to construct a shopping centre on the land in question, and that upon allotment of such shops, the petitioner will get much higher price which would enable the petitioner to clear all the dues of the entertainment tax with interest and penalty thereon and would also make substantial amounts available to the petitioner to which the respondent-authorities should not have any objection.

4. On the other hand, the learned AGP has opposed the application and submitted that arrears of entertainment tax to the extent of Rs.60 lakhs approx. plus interest of Rs.29,16,289/- aggregating to Rs.89 lakhs and odd amount were due upto 31.8.1997. Thereafter, in the notice dated 17.7.2003 the amount of arrears was quantified at Rs.87,53,065/- and finally in the recovery notice dated 31.3.2004 issued under the Bombay Land Revenue Code, the arrears were quantified at Rs.87,91,689/- plus interest. It is, therefore, submitted by the learned AGP that when the petitioner is in arrears of such large amounts, the respondent-authorities were justified in putting up the cinema hall with land for auction, and at this belated stage, the petitioner has no right to stall the auction.

5. Having heard the learned counsel for the parties, we are of the view that when the petitioner is not in a position to find out any buyer for the cinema hall even by way of private sale, it is obvious that if the property in question is put up for auction at a distress sale, the property will not fetch its fair market value. Even according to the respondents, the property in question is valued at Rs.96,70,100/as stated in the impugned notice dated 31.3.2004 at Annexure "I". This amount may not be sufficient to cover the entire tax liability of the

petitioner. On the other hand, if the petitioner is permitted to demolish the cinema hall and to construct a shopping centre on the land in question, such shopping centre will obviously fetch much higher price which will enable the petitioner to clear all the outstanding dues and also have a surplus for himself. We are, therefore, of the view that subject to adequate safeguards being imposed, there could not be any reason for not granting the petitioner's prayer.

6. In view of the above discussion, we allow the civil application and permit the petitioner to demolish the cinema hall and to construct a shopping complex on the land bearing Sub-plot Nos.13 and 15 of Final Plot No.629 + 631 in Town Planning Scheme No.23, Moje Achar at Ramnagar, Sabarmati, Ahmedabad of land bearing Survey No.187, subject to the following terms and conditions:-

(i) Within a period of four months from today, the petitioner shall demolish the existing structure and shall commence construction;

(ii) The petitioner shall thereafter complete construction of the shopping centre by September 2005;

(iii) The petitioner shall clear all the outstanding dues of arrears of entertainment tax, interest and penalty by March 2006. In order to enable the petitioner to do so, the petitioner will be allowed to allot and hand over possession of only 20 shops out of 50 shops proposed to be constructed. The petitioner shall not allot or hand over possession of the remaining 30 shops till the petitioner clears all the outstanding dues of entertainment tax, interest and penalty. The petitioner shall be at liberty to collect advance payments for booking shops but shall not make allotment or hand over possession of the shops. The petitioner shall also inform the intending purchasers that no allotment of the shop shall be made till September 2005 and that out of the 50 shops to be constructed, allotment of only 20 shops will be made between September 2005 and March 2006;

(iv) Till the construction is completed, the respondent-authorities shall have a charge over the petitioner's properties being land and the construction which will come up on the land in question;

(v) The petitioner shall go on making payment of Rs.3 lakhs per month till December 2004 as per the order dated 21.4.2004 and thereafter from January 2005 the petitioner shall pay the respondent-authorities Rs.5 lakhs per month towards the arrears of entertainment tax, interest and penalty till September 2005 and the petitioner shall clear all the balance outstanding dues between September 2005 and March 2006.

(vi) The petitioner shall file an undertaking on affidavit within one week from today agreeing to abide by and implement the aforesaid conditions;

(vii) As far as computation of the exact amount of entertainment tax, interest and penalty is concerned, the respondents shall file an affidavit quantifying the amounts and place the same on the record of this petition. It will be open to the petitioner to raise all available contentions regarding such quantification in the petitioner's appeal which is stated to be pending before the Commissioner of Entertainment Tax and the respondents shall place a copy of the order which may be passed by the Commissioner of Entertainment Tax, on the record of the present proceedings.

7. Civil Application No.5287 of 2004 is accordingly disposed of.

The main petition shall be listed for hearing in the first week of December 2004

Direct service is permitted.

5. From the aforesaid order dated 5th August, 2004 passed by the Division Bench of this court on Civil Application No.5287 of 2004, it appears that the petitioner had to demolish the existing structure and commence construction within a period of four months from

the date of the order, he has to complete the construction of shopping centre by September, 2005, he has to clear all the outstanding dues of arrears of entertainment tax, interest and penalty by March, 2006 and till the construction is completed, the respondent authorities shall have a charge over the petitioner's property in the land and the construction which will come up on the land in question. One more condition was that the petitioner shall make payment of Rs.3 lakhs till December, 2004 and as per the order dated 21st April, 2004 passed in this writ petition, from January, 2004 he will have to pay Rs.5 lakhs per month towards the arrears of entertainment tax, interest and penalty till September, 2005 and the petitioner has to clear all the balance outstanding amount due between September 2005 and March, 2006. The petitioner was directed to file an undertaking on affidavit within one week from the date of the order agreeing to abide by and to implement these conditions.

6. The aforesaid conditions imposed by the Division Bench of this court have been breached more than once. It was pointed out by learned AGP Shri Dave for the respondent authorities that even cheques paid by the petitioner were bounced. Even today, there is a deficiency of Rs.3 lakhs towards the monthly instalments and a substantial amount, running into lakhs of rupees, is still due against the petitioner. He, therefore, submitted that the petition be dismissed. However, learned counsel Shri Suthar for the petitioner submitted that though there were some breach of conditions on the part of the petitioner in not paying the instalments regularly and that there is a deficit of Rs.3 lakhs towards the instalments even today but on this ground, his petition should not be dismissed and he should be given some reasonable time for paying up the said amount.

7. It is to be stated that the petitioner had already collected tax amount from the viewers but not paid to the State Government for a considerably long time. He was required to pay, in all, Rs.60 lakhs plus interest in March, 2003. At the first instance, he had approached the Civil Court by way of Civil Suit No.1346 of 2003 and thereafter, approached this court with a prayer that the respondent authorities be directed to permit the petitioner to make the payment of outstanding entertainment tax by way of monthly instalments. Even though by an interim order, indulgence was shown to the petitioner, he has misused the same and committed breach of the conditions imposed by this court in its order dated 21st April, 2004 passed on this writ petition and

order dated 5th August, 2004 passed on Civil Application No.5287 of 2004.

8. Extraordinary writ jurisdiction of this court under Article 226 of the Constitution cannot be exercised in favour of the petitioner for all time to come. It was rightly pointed out by learned AGP Shri Dave for the respondent authorities that without bringing it to the notice of the previous Division Bench of this court that he was required to first obtain the permission from the AUDA authorities for putting up the construction after demolishing the existing structure, he had obtained the order from this court of demolishing the existing structure and to commence construction on the land on certain terms and conditions and thereafter, regularly he used to commit breach of those conditions.

9. It appears that the petitioner has now roped his brother who is a builder for construction after demolishing the structure but no terms and conditions of the agreement is produced on record. It seems that the petitioner is simply indulging in delay tactics in making the payment late. At the cost of repetition, we may state that ordinarily, discretionary jurisdiction should not be exercised in favour of such persons. Inspite of it, by an interim order, some indulgence was shown by the previous Division Bench of this court but that is also misused. Under the circumstances, we refuse to exercise our discretionary writ jurisdiction under Article 226 in favour of such petitioner.

10. In view of the above discussion, this petition fails and is hereby dismissed. Interim relief granted earlier on this petition as well as on Civil Application No.5287 of 2004 stands vacated forthwith. Rule discharged. No costs.

(B.J. Shethna, J.)

(M.C. Patel, J.)

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